Supreme Court U.S.
FILED
JAN 13 2003
OFFICE OF THE CLERK

No. 02-215

IN THE

Supreme Court of the United States

PACIFICARE HEALTH SYSTEMS, INC., *et al.*,

Petitioners,

v.

JEFFREY BOOK, D.O., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

Whether on a motion to compel arbitration the court has the authority to determine arbitrability of federal claims including the gateway question of whether a prospective litigant effectively may vindicate his federal statutory cause of action in the arbitral forum.

Whether an arbitration agreement which prohibits an award of federal statutory remedies prevents effective vindication of federal rights and is therefore unenforceable as to those federal causes of action.

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STATEMENT

Respondents Dr. Manual Porth, Dr. Glenn Kelly, Dr. Jeffrey Book and Dr. Dennis Breen are practicing physicians. Their patients include persons who are insured through United and/or PacifiCare health plans. After a physician provides medical services, the physician must submit a standardized claim form to the health plan in order to be paid for the medical services he or she has provided. Respondents along with other physicians initiated this action against several managed care companies including United and PacifiCare because the companies were systematically delaying and denying payments to physicians and manipulating claims data in order to reduce payment to physicians. As alleged in the complaint, these companies possess overwhelming and dominant economic and market power. As a result of their market dominance, they can coerce physicians into accepting contracts on a "take or leave it basis." R.167 ¶ 174.[1]

Dr. Porth's contract with United contains an arbitration provision which requires arbitration to be commenced within one year of written notice of a dispute and which expressly defines the arbitrator's authority:

> The arbitrators may construe or interpret but shall not vary or ignore the terms of this Agreement, shall have no authority to award extra contractual damages of any kind, including punitive or exemplary damages, and shall be bound by controlling law.

J.A. 168. Dr. Kelly's contract with United contains the same provisions except that the arbitrators are only prohibited from awarding punitive or exemplary damages. J.A. 212. Neither agreement contains a severability provision. PacifiCare's contracts with Dr. Book and Dr. Breen also contain arbitration

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1. Citations to the underlying record will reference the docket number and the relevant page number(s) or, where appropriate, paragraph number(s).

provisions with a prohibition on the award of punitive or exemplary damages. J.A. 84, 107.

Petitioners moved to compel arbitration of Respondents' claims. The District Court in this multidistrict litigation reviewed numerous arbitration agreements involving multiple managed care companies. Contrary to the statement of Petitioners, the District Court did not nullify the arbitration agreements. The District Court refused to compel arbitration of "RICO conspiracy and aiding and abetting claims that stem from contractual relationships with other managed care companies."[2] The District Court compelled arbitration of most other claims over numerous objections including arguments relating to filing fees and costs and class relief. Based on the United agreement's prohibition on extracontractual damages, the District Court determined that Dr. Porth would not be able to obtain meaningful relief for his RICO claims. The Court also noted "concerns" relating to the imposition of a one-year limitations period in regard to Dr. Porth's and Dr. Kelly's agreement. In regard to United's agreement with Dr. Kelly and PacifiCare's agreements with Dr. Breen and Book, the Court determined that the limitations on punitive and exemplary damages would preclude recovery of treble damages. The Court held the agreements unenforceable as to Respondents' federal RICO claims. The Eleventh Circuit Court of Appeals affirmed "in its entirety the district court's order." *In re Humana Inc. Managed Care Litigation*, 285 F.3d 971, 973 (11th Cir. 2002), *cert. granted*, 123 S. Ct. 409 (2002).

SUMMARY OF THE ARGUMENT

With the enactment of the Federal Arbitration Act in 1925, Congress endorsed the use of an alternative forum for commercial and maritime contractual disputes. Since that time, substance has in large measure given way to forum. Few transactions are now free from arbitration and those with limited economic power are often left with no other recourse. Court

2. The Court of Appeals affirmed the District Court's opinion in its entirety. No party filed a petition for certiorari regarding this issue.

access, one of the most fundamental American rights, is simply no longer available for many causes of action. Access to arbitral justice, however, is rarely free and is generally governed by far-reaching procedural limitations. Federal rights are subject to arbitration and are likewise susceptible to the constraints and exactions of arbitration but only "so long as the potential litigant may effectively vindicate his federal rights in the arbitral forum."

Petitioners contend that Respondents not only should be denied court access for a determination of their substantive federal rights but also should be denied court access for a determination regarding the arbitrability of their federal rights. Petitioners' contention, however, must give way to the Court's precedent.

Beginning with the *Steelworkers Trilogy* and continuing through the Court's decision in *Howsam*, the Court has steadfastly held that courts, not arbitrators, must determine substantive questions of arbitrability. Beginning with *Mitsubishi* and continuing through *Green Tree* and *Waffle House*, the Court has also consistently indicated that federal causes of action are arbitrable only if the potential litigant's federal rights may effectively be vindicated in the arbitral forum.

A court, considering a motion to compel arbitration of a federal cause of action, therefore, has a duty to determine as an initial matter whether the federal cause of action can be effectively vindicated in the arbitral forum. The authority and the responsibility to discern and reconcile the competing federal interests resides, as it must, in the judiciary. Once the court has been presented with a specific conflict between the federal cause of action and arbitration, the court cannot, as Petitioners suggest, simply defer the determination of arbitrability. Post-arbitration review is essential but is not sufficient to protect federal causes of action.

Access barriers, procedural limitations or substantive denials in arbitration can effectively eviscerate a party's ability to pursue his or her rights. Because Petitioners' arbitration

agreements expressly limit the arbitrator's ability to award appropriate damages for Respondents' RICO claims, the agreements are unenforceable as to those claims.

First, United's agreement with Dr. Porth prohibits the arbitrator from awarding "extracontractual damages". This phrase is simply not susceptible to an interpretation that would allow the award of RICO treble damages. Arbitration of Dr. Porth's RICO claims would, therefore, result in a significant loss of his substantive federal rights.

Second, each of the arbitration agreements precludes the award of "punitive" or "exemplary" damages. Although the Court has determined that antitrust and RICO treble damages serve a remedial purpose, the Court has also consistently characterized such damages as punitive or exemplary. Because RICO treble damages are at least, to some degree, punitive or exemplary, a prohibition on such damages necessarily limits Respondents' ability to fully and effectively vindicate their RICO claims in the arbitral forum.

The District Court properly determined that the Respondents' RICO claims are nonarbitrable and that the arbitration agreement is unenforceable as to the federal cause of action. The District Court had neither the authority nor the duty to restructure the parties' agreement.

The Court should neither accept nor condone a rule of law which entrusts federal statutory and constitutional rights, at least as an initial matter, to nonjudicial discretion. An arbitration agreement which encompasses federal causes of action should result in a change of forum rather than a forfeiture of the "substantive rights afforded by the statute." An employee's agreement to arbitrate as a condition of employment, a consumer's consent to a predispute arbitration provision as a requirement for access to goods and services or even a doctor's concession to arbitration as a prerequisite for treating his own patients should not result in a forfeiture of substantive federal rights. If individual citizens and the public at large are to be

accorded the full measure of rights bestowed by Congress, courts must have the authority to make a gateway determination of arbitrability including an assessment regarding the viability of the federal claim in the arbitral forum. If the court's authority were confined to a determination that an arbitration agreement in fact exists, then the protection of federal rights would extend no further than the reach of each individual citizen's bargaining power.

ARGUMENT

I. The Court, Not The Arbitrator, Must Decide Arbitrability Including The Gateway Question Of Whether A Prospective Litigant Effectively May Vindicate His Federal Statutory Cause Of Action In The Arbitral Forum.

Judicial resolution of gateway arbitrability disputes constitutes one the most fundamental precepts of arbitration jurisprudence. *Howsam v. Dean Witter Reynolds, Inc.*, 123 S. Ct. 588 (2002); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995); *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960). The Court has repeatedly held that "the '*question of arbitrability*,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" *Howsam v. Dean Witter Reynolds, Inc.*, 123 S. Ct. 588, 591 *quoting AT&T Technologies Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986) (emphasis in original).

Petitioners concede, as they must, that arbitrability is a question for the court. Petitioners contend, however, that the court's arbitrability determination is limited solely to a determination of whether the parties' arbitration agreement encompasses the statutory cause of action and whether Congress

has clearly and uncategorically proscribed arbitration of the specific federal cause of action. The Court's role, while limited, is not so circumscribed. The Court has maintained the tenuous balance between substantive federal policies and the policies underlying the Federal Arbitration Act by requiring a gateway judicial determination as to whether the terms of the arbitration agreement require forfeiture of substantive rights and deny the litigant the ability to vindicate his statutory cause of action in the arbitrable forum. This analysis, which weighs and reconciles competing federal interests, is reserved, as it must be, to the discretion of courts rather than arbitrators who have a financial interest in determining disputes to be arbitrable and who have no special expertise in federal statutory causes of action. Questions relating to the ability of the litigant to effectively vindicate his or her rights in the arbitral forum are not distinct from the issue of arbitrability as Petitioners contend but are, in fact, determinative of the arbitrability of federal statutory causes of action.

The determination of "who – court or arbitrator – has the primary authority to decide"[3] arbitrability is always critical, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995), but is never more imperative than in the context of federal statutory or constitutional claims. The Court has often struggled to reconcile the tension between the federal policy favoring arbitration and the policies underlying federal statutory causes

3. The question of "who" has the authority to decide the issue of arbitrability is completely distinct from the merits of the decisionmaker's resolution of the arbitrability issue. Petitioners' argument focuses primarily on the question of whether the District Court reached the wrong conclusion regarding the arbitrability of Respondents' RICO claims rather than the authority of the court to reach the issue. If the District Court in this case had agreed with Petitioners that the Respondents had failed to present sufficient evidence that they would be unable to vindicate their federal rights in the arbitral forum, as the Court did in *Green Tree*, the District Court's decision would have nonetheless been an adjudication regarding the arbitrability of the claim.

of action.[4] Courts and commentators have debated the applicability of the Federal Arbitration Act to statutory causes of action and continue to question the uneasy union between arbitration and statutory rights where the need for protection is greatest and the litigant's power to bargain is often little more than myth.[5] Courts initially refused to compel arbitration of

4. Compare *Wilko v. Swan*, 346 U.S. 427, 438 (1953), *overruled by Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). ("As the protective provisions of the Securities Act require the exercise of judicial discretion to fairly assure their effectiveness, it seems to us that Congress must have intended § 14 . . . to apply to waiver of judicial trial and review"); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56-57 (1974) ("Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII . . . The specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land") with *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) ("[W]e find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims.") and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989) ("To the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with out current strong endorsement of the federal statutes favoring this method of resolving disputes").

5. *See, e.g., Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997); Paul L. Edenfield, *No More the Independent and Virtuous Judiciary?: Triaging Antidiscrimination Policy in a Post-Gilmer World*, 54 Stan. L. Rev. 1321 (2002); Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right To A Jury Trial*, 16 OHSJDR 669 (2001); Colin P. Johnson, *Has Arbitration Become A Wolf in Sheep's Clothing?: A Comment Exploring The Incompatibility Between Pre-Dispute Mandatory Binding Arbitration Agreements in Employment Contracts and Statutorily Created Rights*, 23 Hamline L. Rev. 511 (2000); Eric A. Hernandez, *Mandatory Arbitration and Employment Discrimination: The Unfair Law*, 2 Cardozo Online J. Conflict Resol. 96 (2000); Harry T. Edwards, *Where Are We Heading with Mandatory Arbitration of*

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statutory causes of action. *See Wilko v. Swan*, 346 U.S. 427 (1953), *overruled by Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). The Court ultimately rejected an across-the-board determination of nonarbitrability, first in the context of international agreements, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and then in domestic arbitration. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987). The Court cautioned, however, that statutory causes of action, which embody unique public policy concerns, are not automatically subject to arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985).

A federal statutory claim is arbitrable only if a court determines, as an initial matter, that (1) the parties' agreement to arbitrate reaches the statutory issues and (2) "legal constraints external to the parties' agreement" do not foreclose arbitration of the statutory claims. *Mitsubishi*, 473 U.S. at 628. The most significant legal constraint on the arbitration of federal statutory claims is the requirement that the agreement result only in a change of forum rather than a forfeiture of the "substantive rights afforded by the statute." *Id. See also Equal Employment Opportunity Commission v. Waffle House, Inc.*, 534 U.S. 279, 295 n.10 (2002); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105,123 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 229 (1987).

Federal statutory claims are validly arbitrable only "so long as the prospective litigant effectively may vindicate [the]

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Statutory Claims in Employment?, 16 Ga. St. U. L. Rev. 293 (1999); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 Hofstra Lab. L. J. 1 (1996).

statutory cause of action in the arbitral forum."[6] *Mitsubishi Motors Corp. v. Soler Chyrsler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985). *See also Green Tree Financial Corp. – Alabama v. Randolph*, 531 U.S. 79, 90 (2000); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) and *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 240 (1987). If a potential litigant forfeits substantive rights or cannot otherwise effectively vindicate his statutory claims in the arbitral forum, then an inherent conflict exists between arbitration and the federal act at issue; the arbitration agreement is accordingly unenforceable. *Shearson/American Express, Inc.*, 482 U.S. at 242.

The Court clearly applied this analysis in *Green Tree Financial Corp. – Alabama v. Randolph*, 531 U.S. 79 (2000), where the Court addressed the petitioner's substantive argument that the parties' arbitration agreement was unenforceable because the fee splitting provision in the agreement precluded effective vindication of her federal TILA claims:

> In determining whether statutory claims may be arbitrated we first ask whether the parties agreed to submit their claims to arbitration, and then ask whether Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. . . . In this case, it is undisputed that the parties agreed to arbitrate all claims relating to their contract, including claims involving statutory rights. Nor does Randoph contend that the TILA envinces an intention to preclude a waiver of judicial remedies. She contends instead that the arbitration agreement's silence with

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6. In his dissent in *Wilko v. Swan*, 346 U.S. 427, 439 (1953), *overruled by Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), Justice Frankfurter noted, "There is nothing in the record before us, nor in the facts of which we can take judicial notice, to indicate that the arbitral system . . . would not afford the plaintiff the rights to which he is entitled."

> respect to costs and fees creates a "risk" that she will be required to bear prohibitive arbitration costs if she pursues her claims in an arbitral forum, and thereby forces her to forgo any claims she may have against petitioners. Therefore, she argues, she is unable to vindicate her statutory rights in arbitration. . . . It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum.

Green Tree Financial Corp.- Alabama v. Randolph, 531 U.S. 79, 90 (2000) (citations omitted). *See Investment Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F.3d 314, 316 (5th Cir. 2002).

Numerous Circuit Courts have adhered to the Court's mandate to consider inherent conflicts between federal rights and arbitral forum before compelling arbitration of federal causes of action. *See Brooks v. Travelers Ins. Co.*, 297 F.3d 167 (2d Cir. 2002) (numerous limitations including restrictions on the length of the hearing, damages, and attorneys' fees and costs); *Investment Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F.3d 314 (5th Cir. 2002) (restriction on punitive damages in RICO action); *Blair v. Scott Specialty Gases*, 283 F.3d 595 (3d Cir. 2002) (considering arbitrator's fees but deferring questions regarding statute of limitations to arbitrator); *Perez v. Globe Airport Security Services, Inc.*, 253 F.3d 1280 (11th Cir. 2001), *rehearing and rehearing en banc denied*, 273 F.3d 1118, *vacated per stipulation*, 294 F.3d 1275 (11th Cir. 2002) (expenses of arbitration, attorneys' fees and costs); *Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549 (4th Cir. 2001) (fees and costs associated with arbitration; *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306 (6th Cir. 2000), *cert. denied*, 531 U.S. 1072 (2001) (acknowledging concerns relating to biased and incompetent arbitrators and fee structure but finding agreement unenforceable on other grounds); *Shankle v. B-G Maintenance Management of Colorado, Inc.*, 163 F.3d 1230

(10th Cir. 1999) (arbitration fees and costs); *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998) (limitation on remedies); *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir. 1994), *cert. denied*, 516 U.S. 907 (1995) (restriction on exemplary damages, attorneys' fees and reduced statute of limitations). *But see Thompson v. Irwin Home Equity Corp.*, 300 F.3d 88 (1st Cir. 2002) (attorneys' fees); *Metro East Center for Conditioning and Health v. Qwest Communications Int'l, Inc.*, 294 F.3d 924 (7th Cir. 2002), *cert. denied*, 123 S. Ct. 707 (2002) (holding that issue relating to attorneys' fees was to be decided by FCC but discussing in dicta the appropriateness of determination by arbitrator); *Larry's United Super, Inc. v. Werries*, 253 F.3d 1083 (8th Cir. 2001) (exclusion of punitive damages in RICO action)[7].

Parties would reasonably expect a court to determine, as an initial matter, whether an arbitration provision impermissibly burdens a litigant's statutorily defined rights. Arbitrators often address procedural issues and at times must consider "whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met." *Howsam v. Dean Witter Reynolds, Inc.*, 123 S. Ct. 588, 592 (2002), quoting Revised Uniform Arbitration Act § 6, comment 2, 7 U.L.A., at 13 (Supp. 2002) (emphasis omitted). Arbitrators possess certain undisputed expertise, including a "greater institutional competence . . . in interpreting collective-bargaining agreements." *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986). "On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts. . . ." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974). Courts have the

7. The following cases, cited by Petitioners, are inapposite because federal claims were not at issue: *Boomer v. AT&T Corp.*, 309 F.3d 404 (7th Cir. 2002); *Arkcom Digital Corp. v. Xerox Corp.*, 289 F.3d 536 (8th Cir. 2002); *MCI Telecommunications Corp. v. Matrix Communications Corp.*, 135 F.3d 27 (1st Cir. 1998), *cert. denied*, 524 U.S. 953 (1998); *Great Western Mort. Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997), *cert. denied*, 522 U.S. 915 (1997).

ability, the authority and the duty to reconcile competing federal policies. Arbitrators do not function as substitute federal courts and are not charged with reconciling counterbalancing federal policy concerns. Arbitrators have no expertise in the resolution of legal issues. Arbitrators generally determine the rights of the parties in accordance with the terms of the parties' agreement. Judicial resolution is necessary to insure "a fair and expeditious resolution of the underlying controversy." *Howsam v. Dean Witter Reynolds, Inc.*, 123 S. Ct. 588, 593 (2002).

Moreover, the arbitration proceeding does not establish the same kind of predictability and reliability in interpreting the law that the federal judiciary provides. Federal judges, nominated by the President and confirmed by the Senate, are specially qualified to interpret federal laws. They write opinions that establish precedent to be followed in other similar cases. Arbitrators are not generally required to write or publish opinions. Arbitrators can and do interpret laws in differing ways with no adequate or meaningful review to insure the consistent application of the rule of law with respect to acts of Congress.

The "wait and see" approach advocated by Petitioners is not a tenable alternative to a judicial determination of arbitrability. The initial arbitrability determination and post-arbitration review each serve distinct roles and are not interchangeable. The Court in *Gilmer* and *McMahon* indicated that post-arbitration review is sufficient to overcome generalized concerns regarding the incompatibility of arbitration and statutory claims. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987) ("[T]here is no reason to assume at the outset that the arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 n.4 (1991). However, at no point has the Court indicated that the potential for limited post-arbitration review excuses an initial arbitrability determination where parties seek resolution regarding specific barriers to the

vindication of their statutory rights. In fact, the Court in *Gilmer* analyzed whether any specific impediments – including bias, limited discovery, lack of written decisions – would curtail the litigant's ability to vindicate his ADEA claims. *Gilmer*, 500 U.S. at 30-32. The Court in *Gilmer* also specifically noted that the arbitrator's remedial authority was not restricted. *Id.* at 32.

Petitioners also cite this Court's decisions in *Mitsubishi* and *Vimar Seguros* as support for their contention that the court's role is confined to post-arbitration review. *Mitsubishi* and *Vimar Seguros* involved international arbitration agreements which raise additional federal policy concerns not present in the context of domestic arbitration agreements. *See Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth, Inc.*, 473 U.S. 614, 629 (1985) ("[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need for the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in the domestic context.") *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995) ("If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements"); *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1294 (11th Cir. 1998) ("Supreme Court precedent thus suggests that the enforceability of choice clauses in international agreements should be determined by a framework designed specifically for the international commercial context").

More importantly, the petitioners in *Mitsubishi* and *Vimar* raised only the possibility that the arbitrator would not properly apply United States law. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539-540 (1995) ("Petitioners' second argument against enforcement of the Japanese arbitration

clause is that there is no guarantee foreign arbitrators will apply COGSA. . . . At this interlocutory stage it is not established what law the arbitrators will apply to petitioner's claim or that petitioner will receive diminished protection as a result.") *Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth, Inc.*, 473 U.S. 614, 636 (1985) ("There is no reason to assume at the outset that international arbitration will not provide an adequate mechanism.") Although the agreement might have potentially been unenforceable as applied by the arbitrator, a conflict with federal law was not apparent from the face of the agreement itself. In this case, the District Court did not indulge in generalized concerns regarding the ability of arbitrators to correctly apply federal law. Instead, the District Court properly considered whether a conflict exists between the express limitations in the agreement and Respondents' federal RICO claims. A judicial determination regarding whether an express limitation would preclude the litigants from vindicating their statutory rights does not usurp the rule of the arbitrator and does not eviscerate the contractual expectations of the parties. The Court's decisions in *Mitsubishi*, *McMahon*, *Gilmer* and *GreenTree* contemplate that a district court will address specific arbitratibility disputes utilizing precisely the type of analysis the District Court undertook in this case. The possibility of circumspect post-arbitration review is not a valid substitute for a judicial determination of arbitrability.

Denying a litigant judicial consideration of the arbitrability of his federal right until after arbitration on the merits would be both prejudicial and inefficient. Parties would be subjected first to arbitration and then to a judicial determination of the arbitrator's decision. One of the primary benefits of arbitration is a speedy, final determination. Post-arbitration review would potentially be more intrusive and less deferential than an initial determination of arbitrability. In addition, arbitrators can only consider arbitration agreements that frustrate federal causes of action on an ad-hoc basis; federal rights should be subject to a uniform rule of law.

A gateway assessment of arbitrability is necessary to insure that a party is not compelled to submit nonarbitrable issues to an arbitral forum. A litigant cannot be compelled to arbitrate a claim prior to a judicial determination of arbitrability. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-47 (1964). *See also AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986); Thomas H. Oehmke, 2 *Commercial Arbitration* § 47.05 (Cumulative Supp. 2002). Denying pre-arbitration review completely eviscerates the policies underlying the federal cause of action and belies the protection and respect accorded statutory claims in *Mitsubishi*, *McMahon* and *Gilmer*. Given the remedial limitations in the arbitration provision, Respondents cannot vindicate their statutory rights in the arbitral forum. Neither legal precedent nor public policy allow a court to defer the arbitrability determination for post-arbitration review.

Petitioners' argument suggests that arbitrators function as alternate district courts subject to judicial review. Petitioners' view of the interplay between arbitration and judicial oversight is not only overly simplistic but highly distorted. Arbitrators are not judges with expertise in interpreting the law and, in fact, many arbitrators are not even lawyers. Arbitrators are creatures of contract, limited by the terms of the agreement itself. The arbitration provisions in this case provide express limitations on the authority of the arbitrator. The arbitrator cannot vary from the contract terms and cannot freely ignore the limitations on his authority in order to substitute his concept of federal public policy. Should the arbitrator fail to adhere to the express provisions of the agreement, including the agreement's limitation on damages, the FAA accords Petitioners the right to seek an order vacating the award. *See Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1061 (11th Cir. 1998). The arbitrator cannot adjudicate whether the restraint is an impermissible limitation on the party's federal cause of action. Awaiting the arbitrator's application of the remedial limitations

will neither increase nor decrease the permissibility of the limitations.

Petitioners argue that courts do not have the authority to review any aspect of the terms and conditions of arbitration for statutory causes of action unless Congress has clearly indicated that the cause of action is nonarbitrable. Under this view of the law, a district court would have no discretion in compelling arbitration of discrimination claims cognizable under federal law where the agreement expressly includes the claims but where the arbitrator is specifically denied the ability to remedy such discrimination. The limitation on extra-contractual damages in this case is indistinguishable.

Courts, which are empowered to determine the gateway issue of substantive arbitrability, should not abstain from such a determination. "[T]he strong policy favoring arbitration [does not] relieve the court of its duty to make the abitrability determination." Thomas H. Oehmke, 2 *Commercial Arbitration* § 47.05 (Cumulative Supp. 2002). The Court, likewise, should not embrace a general rule of law that relegates a litigant's federal statutory rights to arbitration regardless of the degree to which the arbitration agreement forecloses vindication of the federal cause of action.

II. An Arbitration Provision Which Excludes Or Severely Limits Substantive Federal Statutory Rights Or Remedies Is Unenforceable.

In determining whether a federal cause of action is arbitrable, the court must determine whether the litigant will be denied the ability to vindicate federal rights in the arbitral forum. A right can be denied "in express terms" but can also be "denied in substance and effect". *Ward v. Board of County Com'rs of Love County, Oklahoma*, 253 U.S. 17, 22 (1920). Procedural and substantive limitations in arbitration severely restrict and can easily extinguish a litigant's cause of action. Federal rights, which protect public interests and which level the playing field

between those with disparate bargaining power, should not be dependent on the benevolence of those with dominant economic control.

Procedural inequities should not be used to defeat "the assertion of Federal rights, when plainly and reasonably made." *Davis v. Wechsler*, 263 U.S. 22, 24 (1923). Arbitration agreements often contain procedural limitations such as the one-year limitation period in Dr. Porth's and Dr. Kelly's agreement with United. J.A. 168-169. In addition to time limitations, potential litigants, with little or no bargaining power and no option other than acquiescing to mandatory pre-dispute arbitration agreements, can be subjected to payment of arbitration fees and costs[8], unilateral or restricted ability to choose the neutral[9], meager discovery[10], lack of compulsory process[11], differing burdens of proof[12], evidentiary distinctions[13], limited judicial review of arbitral awards[14] and other procedural requirements and barriers to access which severely affect substantive outcomes. In addition, employers, corporations and industries, which often require an agreement to arbitrate as a condition of employment or as a condition for accessing goods

8. *See, e.g., Green Tree Financial Corp.- Alabama v. Randolph*, 531 U.S. 79 (2000)

9. *See, e.g., Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

10. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974).

11. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974).

12. *See, e.g.*, Andrew C. Glass & Albert S. Lee, *The Validity of Arbitral Awards of Punitive Damages*, 1 HVNLR 193, 199-200 (1996).

13. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57-58 (1974).

14. *See, e.g. Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Montes v. Shearson Lehman Bros.*, 128 F.3d 1456 (11th Cir. 1997) (review for manifest disregard for the law but not for legal error).

and services, also frequently contend that arbitration cannot be pursued on a collective or class basis.[15] Such procedural

15. The Court has suggested that "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001). Such incentives may well exist for parties to commercial contracts where the parties will individually bear the costs of litigation. Such incentives do not exist for most non-commercial plaintiffs because legal representation is based on contingency fee agreements or statutory fee mechanisms. Permitting those with superior bargaining power the unfettered ability to require an agreement to arbitrate which prohibits the award of statutory attorneys' fees would often mean that those asserting federal statutory causes of action will be unrepresented and, accordingly, unable to effectively vindicate their federal rights. Likewise, class actions are not simply procedural mechanisms. As this Court has recognized, "the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" *AmChem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997), quoting Kaplan, Prefactory Note 497.

> 'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's labor).'

AmChem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997), quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997). Absent the ability to obtain statutory fees and to bring actions collectively, plaintiffs with federal statutory claims and most consumers with relatively small claims do not benefit from the cost-avoidance of arbitration. Instead, their ability to secure representation and to effectively vindicate their rights will be vastly curtailed. Corporations and industries with the power to require employees, consumers, and service providers to enter predispute arbitration agreements understand that "procedural" limitations have great "substantive" benefits. *See* Jean R. Sternlight,

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limitations and access requirements can deny potential litigants the ability to vindicate federal causes of action in arbitration.

Substantive limitations and exclusions are even more oppressive. Arbitration agreements can expressly deny the recovery of statutory attorneys' fees and costs or, alternatively, can fail to provide the arbitrator with the authority to grant such relief.[16] The arbitration agreements at issue in this case severely restrict the arbitrator's remedial authority. Compelling arbitration where the arbitrator does not have the authority to award statutory remedies, attorneys' fees and costs deprives litigants of substantive rights under numerous federal statutes, including RICO. Arbitration agreements should not result in a forfeiture of the "substantive rights afforded by the statute." *Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth, Inc.*, 473 U.S. 614, 628 (1985). The Court has indicated that it "would have little hesitation in condemning" an agreement which operates "as a prospective waiver of a party's right to pursue statutory remedies. . . . as against public policy." *Mitsubishi*, 473 U.S. at 637 n.19. *See also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995).

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Should an Arbitration Provision Trump the Class Action? No: Permitting Companies to Skirt Class Actions Through Mandatory Arbitration Would Be Dangerous and Unwise, 8 No. 3 Disp. Resol. Mag. 13 (2002). In addition, litigation which is too complex and too costly to pursue on an individual basis such as this case will not be pursued in arbitration absent class mechanisms. The Court has not yet decided the availability of class-wide relief in arbitration. Class certification in arbitration is essential and is even more imperative if the Court expands the role of arbitrators in order to insure consistent application of the law and to assure effective vindication of statutory rights. *See Bazzle v. Green Tree Financial Corp.*, 569 S.E.2d 349 (S.C. 2002), *cert. granted*, 71 U.S.L.W. 3320 (U.S. 2003).

16. *See, e.g., Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir. 1994), *cert. denied*, 516 U.S. 907 (1995).

Remedies are an inseparable component of any civil cause of action. Treble damages are the "carrot" Congress chose to assure prosecution of RICO claims. *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 151 (1987). An arbitration agreement which precludes recovery of such damages unavoidably conflicts with Congress's intent in enacting the treble damages provision and, accordingly, is unenforceable. At least three Circuit Courts of Appeal have determined that arbitration agreements which encompass federal statutory causes of action must provide meaningful relief for those claims. *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998); *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997); *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir. 1994), *cert. denied*, 516 U.S. 907 (1995). *See also Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285 (11th Cir. 1998), *cert. denied*, 525 U.S. 2093 (1999) and *Roby v. Corp. of Lloyd's*, 996 F.2d 1353 (2d Cir. 1993), *cert. denied*, 510 U.S. 945 (1993) (holding, in the context of international arbitrations, that adequate remedies must be made available).

A. Dr. Porth Cannot Recover Treble Damages Under United's Arbitration Agreement Which Limits the Arbitrator's Ability to Award Extracontractual Damages.

A plaintiff who prevails under RICO is permitted to recover "threefold the damages he sustains." 18 U.S.C. § 1964(c). Yet, United's agreement with Dr. Porth expressly limits the arbitrator's remedial authority, prohibiting the award of any "extracontractual damages, including punitive or exemplary damages". J.A. 168. Based on the plain meaning of the exclusion, the District Court concluded that the arbitrator would be prohibited from awarding RICO treble damages which are not contract damages. Because Dr. Porth would be unable to vindicate his Federal RICO claims in the arbitral forum, the District Court refused to enforce the agreement. *In re Managed Care Litigation*, 132 F. Supp. 2d 989, 1000 (S.D. Fla. 2000).

The District Court's interpretation of the damages exclusion accords with the plain meaning of the language. "Extra" is "[a] Latin preposition, occurring in many legal phrases, and meaning beyond, except, without, out of, outside" or "additional". *Black's Law Dictionary* 585 (6th ed. 1990). Accordingly, extracontractual damages are any damages beyond or in addition to contractual damages.

Petitioners suggest that the limitation on "extracontractual damages" would preclude only non-economic damages, not treble damages. The phrase is simply not susceptible to such an interpretation. Even the authorities cited by Petitioners support the District Court's interpretation of the plain meaning of the limitation. Petitioners first cite Dan B. Dobbs, *Law of Remedies* § 12.1(1), at 753 (2d ed. 1993) ("Punitive damages and mental anguish damages are thus considered 'extracontractual,' and usually denied in pure contract cases.") The statement that such damages are, in fact, extracontractual, does not limit the phrase "extracontractual" to such damages and does not suggest that other types of damages are not also extracontractual damages. The citation instead suggests that "extracontractual" damages are any damages that would not be allowed in "pure contract cases." Petitioners citation of *Barnes v. Gorman*, 122 S. Ct. 2097, 2102 (2002) also supports this understanding. In *Barnes*, the Court noted that "punitive damages, unlike compensatory damages, and injunction, are generally not available for breach of contract". *Barnes*, 122 S. Ct. at 2102. RICO treble damages, which are not compensation for breach of contract, are "extracontractual damages". An arbitrator, acting pursuant to United's arbitration agreement with Dr. Porth, would not have the authority to award treble damages. The damages limitation prevents Dr. Porth from obtaining meaningful relief for his federal RICO claims in the arbitral forum. Accordingly, the arbitration agreement is unenforceable as to the RICO claim[17].

17. This does not mean that the arbitration agreement is unenforceable as to other claims. Petitioners obtain the benefit of their (Cont'd)

B. Respondents' Treble Damage Remedy Would Also Be Precluded Under United's and PacifiCare's Arbitration Agreements as Punitive or Exemplary Damages.

Petitioners' arbitration agreements prohibit an award of punitive or exemplary damages. J.A. 168. Damages are either "compensatory or punitive according to whether they are awarded as the measure of actual loss suffered or as punishment for outrageous conduct and to deter future transgressions." *Black's Law Dictionary* 390 (6th ed. 1990). *See also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20-21 (1991) ("purpose [of punitive damages] is to punish what has occurred and to deter its repetition.") "The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981).

Throughout the Court's history and even under English common law, treble damages have commonly been characterized as punitive or exemplary. The Court noted this history in considering constitutional limitations on punitive damage awards in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996):

> The principle that exemplary damages must bear a "reasonable relationship" to compensatory damages has a long pedigree. Scholars have identified a number of early English statutes authorizing the award of multiple damages for particular wrongs. Some 65 different enactments during the period between 1275 and 1753 provided for double, treble, or quadruple damages.

BMW of North America, Inc. v. Gore, 517 U.S. 559, 580-81 (1996). The Court also discussed the characterization of treble

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bargain to arbitrate except for the federal statutory claims where the Respondents would be required to give up significant remedies available under the federal statute.

damage awards as exemplary or punitive damages in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal Inc.*, 492 U.S. 257 (1989):

> This aspect of our Eighth Amendment jurisprudence might have some force here were punitive damages a strictly modern creation, without solid grounding in pre-Revolutionary days. But the practice of awarding damages in excess of actual compensation for quantifiable injuries was well recognized at the time the Framers produced the Eighth Amendment. Awards of double or treble damages authorized by statute date back to the 13th century, see Statute of Gloucester, 1278, 6 Edw. I, ch. 5, 1 Stat. At Large 66 (treble damages for waste); see also 2 Pollock & Maitland 522, and the doctrine was expressly recognized in cases as early as 1763. Despite this recognition of civil exemplary damages as punitive in nature, the Eighth Amendment did not expressly include it within its scope.

Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 273-75 (1989). *See also Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 n.13 (2001) (noting that a State could adopt a scheme whereby "it defined punitive damages as a multiple of compensatory damages (e.g. treble damages)").

The Fifth Circuit Court of Appeals in *Investment Partners, L.P., v. Glamour Shots Licensing, Inc.*, 298 F.3d 314 (5th Cir. 2202) rejected the plaintiff's argument that a limitation on punitive damages would prohibit an award of RICO treble damages, because the primary purpose of RICO treble damages is remedial. *Investment Partners*, 298 F.3d at 317. The Fifth Circuit Court of Appeals, however, acknowledged that the Court has "referred to treble damage remedies or awards as 'punitive'". *Id* at 317. The Court of Appeals reasoned that "antitrust treble damages may indeed be 'punitive' simply because they exceed the actual damages that have been inflicted on the victim of

violative conduct, but they are not 'punitive' for purposes of interpreting the scope of an arbitration clause." *Id.* at 318.

The Court has indicated that antitrust treble damages and RICO treble damages both have a remedial purpose. *Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth, Inc.*, 473 U.S. 614, 635, (1985); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 240-41 (1987). However, the Court has also consistently recognized that antitrust treble damages, and by analogy, RICO treble damages[18] are, at least in some measure, punitive. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-86 (1977) ("treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing, as we have frequently observed"; "[t]reble damages were provided in part for punitive purposes"); *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 575-76 (1982) ("antitrust treble damages were designed in apart to punish past violations of the antitrust laws . . . [and] to deter future antitrust violations.") In fact, the Court has quantified the "punitive . . . portion of a treble-damages antitrust recovery" as "two-thirds" of the recovery. *Commissioner of Internal Revenue v. Glenshaw Glass Co.*, 348 U.S. 426, 427 (1955). This accords with the plain language of the antitrust act which permits a plaintiff to recover "threefold damages by him sustained", 15 U.S.C. § 15(a) and with RICO which permits a plaintiff to recover "threefold the damages he sustains." 18 U.S.C. § 1964(c). The Court's characterizations suggest that RICO treble damages are, in fact, a hybrid remedy, with both a remedial and a punitive component. *See Faircloth v. Finesod*, 938 F.2d 513, 518 (4th Cir. 1991) ("civil RICO is a square peg and squeeze it as we may, it will never comfortably fit in the round holes of the remedy/penalty dichtomy"). Because RICO treble damages are, at least in part, punitive or exemplary damages, the agreements' restrictions on

18. RICO's treble damage provision was modeled on § 4 of the Clayton Act. *See Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 150-51 (1987); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 241 (1987).

the arbitral award of punitive or exemplary damages curtail Respondents' ability to effectively vindicate their RICO claims in the arbitral forum.

C. Because the Arbitration Agreements Restrict Respondents' Substantive Rights and Their Ability to Vindicate Their RICO Claims, The Agreements Are Unenforceable.

Once a court determines that an arbitration agreement prevents the litigant from effectively vindicating his federal statutory rights in the arbitral forum, then the statutory cause of action is nonarbitrable and the agreement is unenforceable as to those claims. The District Court in this case did not invalidate the arbitration provisions but instead determined that Respondents' RICO claims were not arbitrable based on the agreement's remedial limitations. *In re Managed Care Litigation*, 132 F. Supp. 2d 989, 1000 (S.D. Fla. 2000), *aff'd*, 285 F.3d 971, *cert. granted*, 123 S. Ct. 409 (2002). This is in accord with the Eleventh Circuit's decisions in *Perez v. Globe Airport Security Services, Inc.*, 253 F.3d 1280 (11th Cir. 2001), *rehearing and rehearing en banc denied*, 273 F.3d 1118, *vacated per stipulation*, 294 F.3d 1275 (2002) and *Paladino v. Avnet Computer Technologies*, 134 F.3d 1054 (11th Cir. 1998). The Court in *Green Tree* likewise considered whether the parties' arbitration agreement was "invalid" and "unenforceable" because the agreement was silent as to costs, thereby creating a risk that Randolph would not be able to effectively vindicate her claims in the arbitral forum. *Green Tree Financial Corp. – Alabama v. Randolph*, 531 U.S. 79, 82, 89-91 (2000). The Court concluded that "The record reveals only the arbitration agreement's silence on the subject, and that fact alone is plainly insufficient to render it unenforceable. . . . The 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement." *Green Tree*, 531 U.S. at 91. The Federal Arbitration Act authorizes a court to determine whether an arbitration provision is valid and enforceable. Neither the Act nor the

Court's decisions suggest that courts have the authority or the duty to redraft the agreement of the parties in order to correct an illegal provision.

Refusing to compel arbitration as to Respondents' RICO claims rather than striking the damages limitation is especially compelling in this case. Limitations on the remedial power of the arbitrator are an integrated component of the arbitration agreement and, accordingly, cannot be severed. *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244, 1248 (9th Cir. 1995). This is particularly evident in the United agreements which incorporate the prohibitions on extracontractual and punitive or exemplary damages into the same clause which prohibits the arbitrator from varying or ignoring the terms of the agreement. In addition, these agreements do not contain a severability provision.

Severance of the damages limitations would not create a disincentive to drafters to avoid such illegal limitations. In fact, those with the power to compel predispute arbitration agreements would benefit from the inclusion of the most restrictive limitations, knowing that the limitations will involve no risk but will deter potential litigants and will only be stricken following judicial review (which Petitioners contend should only occur after arbitration is complete). *Perez v. Globe Airport Security Services, Inc.*, 253 F.3d 1280, 1287 (11th Cir. 2001), *rehearing and rehearing en banc denied*, 273 F.3d 1118, *vacated per stipulation*, 294 F.3d 1275 (2002).

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

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